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INDIAN LANDS: FINANCING INDIAN AGRICULTURE: MORTGAGED INDIAN LANDS AND THE FEDERAL TRUST RESPONSIBILITY

*John Fredericks III**

Congress' enactment of the General Allotment Act in 1887 marked the beginning of a new era in federal Indian policy and a dramatic change in the communal property concepts of Indian tribes.[1] Under the Act individual tribal members became owners of parcels of agricultural and grazing lands on their respective Indian reservations. Each reservation was divided into allotments with specified acreage going to each Indian resident. The federal policy expressed in the General Allotment Act was to end the system of tribal land ownership by Indians and to substitute private ownership in order to advance the assimilation of American Indians into white society.[2] In other words, the Indians were to become farmers.

For the most part, the assimilative goals of the General Allotment Act failed, and Indian tribes were able to remain outside the great American melting pot. Nevertheless, the agricultural goals behind allotment of tribal lands had its effect on Indian culture. An agrarian lifestyle was fairly compatible with the culture of the nomadic hunting and gathering tribes of the West, most of whom were on reservations by 1887. Moreover, many Indian tribes had a rich tradition of agriculture long before the first white men came to the New World. As a result, many Indian people easily embraced the agrarian lifestyle after the General Allotment Act. Today, farming and ranching is a major enterprise in Indian country, as fragile as the industry may be.

Section 5 of the General Allotment Act expressly provided that the allotted lands would be held in trust for the sole use and benefit of the allottees and their heirs.[3] The United States Supreme Court has held that this language creates a limited trust relationship that does not of itself impose fiduciary management duties on the United States. Instead, the trust status was intended only to prevent improvident alienation of the allotted lands and assure their

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1. 25 U.S.C. §§ 331 *et seq.* (1982).
2. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).
3. 25 U.S.C. § 348 (1982).

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immunity from state taxation.[4] Many of the allotments retain this trust status today.[5]

It was against the background of the General Allotment Act that Congress in 1956 enacted section 483a of title 25 of the United States Code, which allowed individual Indian owners of trust land to execute a mortgage or deed of trust to such land. All mortgages were made subject to the approval of the Secretary of the Interior.[6] The idea was to encourage individual Indian landholders to utilize commercial credit to the maximum extent possible, under the proper supervision of the federal government.[7]

The Bureau of Indian Affairs (BIA), as the federal agency charged with approving trust mortgages under section 483a, has regularly exercised this authority. In Montana and the Dakotas alone, more than 850 thousand acres of trust land had been mortgaged by 1986.[8] Most of the approved mortgages were taken for agricultural loans. Today, many of these section 483a-approved

4. United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I). *See* United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II).

5. The original plan under the General Allotment Act was that the allotments be held in trust for twenty-five years, after which time the Indian owner would receive a fee patent. However, under section 2 of the Indian Reorganization Act of 1934 (25 U.S.C. § 462 (1982)), the trust period was extended indefinitely.

6. The text of 25 U.S.C. § 483a (Supp. 1986) states in relevant part:

Mortgages and deeds of trust by individual Indian owners

(a) Foreclosure or sale of land

The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.

7. 1956 U.S. CODE CONG. & ADMIN. NEWS 2304.

8. K. Fredericks, "Report to American Indian Agricultural Credit Consortium on Financing Indian Agriculture" (1988) (unpublished). Much of the factual and statistical information in this note is based upon three unpublished reports: "The National Indian Agricultural Working Group, Final Findings and Recommendations" (December 1987) [hereinafter NIAWG Final Report]; the Aberdeen Area Credit Task Force, "Recommendations To Aberdeen Area Director" (Aug. 1, 1985) [hereinafter Task Force Report]; and the Fredericks, AIACC Report, *supra*, authored by Kenneth Fredericks, Sr.

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mortgages are in default. As a result, affected Indian farmers are in danger of losing their land to creditors through foreclosure, and Indian tribes are facing yet another erosion of their land base.

This paper examines the nature and extent of the federal trust responsibility in approving mortgages of trust and restricted allotments. Part I explores the trust responsibilities of the United States in general in the management and protection of Indian property. Part II looks at how these duties apply in the process of approving mortgages under section 483a. Finally, part III examines some possible remedial measures, both judicial and nonjudicial, available to the Indian farmer facing potential foreclosure of trust land.

I. *The Federal Trust Responsibility in General*

Establishing the Fiduciary Relationship

It has long been established that the United States owes general trust responsibilities in its dealings with Indian people,[9] but the extent of these responsibilities is unclear. The existence of the general trust responsibility does not necessarily imply full-fledged fiduciary duties.[10] For purposes of establishing this complete trust, something more than the existence of the common law general trust relationship is required. The United States Court of Claims has gone so far as to say that in order for there to be a complete trust relationship, there must be a clear or strong showing that Congress intended to create such fiduciary duties.[11]

The notion of the Indian trust doctrine evolved judicially, having its origin in two United States Supreme Court cases written by Chief Justice Marshall, *Cherokee Nation v. Georgia*[12] and

9. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); United States v. Kagama, 118 U.S. 375 (1886); Choctaw Nation v. United States, 119 U.S. 1 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Sandoval, 231 U.S. 28 (1913); United States v. Candelaria, 271 U.S. 432 (1926); United States v. Creek Nation, 295 U.S. 103 (1935); Shoshone Tribe v. United States, 299 U.S. 476 (1937); Seminole Nation v. United States, 316 U.S. 286 (1942); United States v. Mason, 412 U.S. 391 (1973); Morton v. Ruiz, 415 U.S. 199 (1974); Mitchell v. United States, 363 U.S. 206 (1983).

10. *See, e.g.*, Mitchell v. United States, 463 U.S. 206, 225 (1983); Montana Bank of Circle v. United States, 7 Ct. Cl. 601, 613 (1985); Fort Belknap Indian Community v. United States, 231 Ct. Cl. 871, 873-74 (1982).

11. Montana Bank of Circle v. United States, 7 Ct. Cl. 601, 613 (1985).

12. 30 U.S. (5 Pet.) 1 (1831).

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Worcester v. Georgia,[13] in 1831 and 1832, respectively. Since that time, the law of the Indian trust doctrine has had an inconsistent and somewhat unstable development. The exact history of this development is beyond the scope of this paper since the real purpose is to examine the trust doctrine as it exists today in connection with the federal government's duties in approving the trust land mortgages.[14]

The discussion will assume the existence of the so-called general trust relationship at the outset. The general trust responsibility essentially encompasses a general duty of fairness and protection. It arises out of the special relationship between the United States and the various Indian tribes, a relationship similar to that of a guardian to his ward.[15] The general trust responsibility has long dominated the United States' dealings with Indian people, and its existence is undisputed.[16] Of more importance is an examination of those duties as they are established in a complete trust with fully accountable fiduciary obligations. Thus, an inquiry into the requirements of establishing this stricter trust relationship is in order.

The United States Supreme Court recently addressed the trust doctrine in *United States v. Mitchell* (*Mitchell II*).[17] *Mitchell II* involved alleged breaches of trust in connection with the BIA's management of forest resources on allotted lands of the Quinault Indian Reservation in Washington state. The plaintiffs were various individuals who owned interests in the allotments on the reservation and who were suing for monetary damages under the Tucker Act.[18] The case was before the Court for the second time. In *Mitchell I*,[19] the plaintiff allottees had asserted that the United States had a fiduciary obligation under the General Allotment Act to manage the timber resources on the allotments and was subject to monetary damages under the Tucker Act for failure to do so. As previously stated, the Court rejected the plaintiff's argu-

13. 31 U.S. (6 Pet.) 515 (1832).

14. An examination of the history and development of the trust doctrine may be found in Chambers, *Judicial Enforcement of the Federal Trust Responsibility*, 27 STAN. L. REV. 1213 (1975).

15. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

16. Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 750 (10th Cir. 1987); Gila River Pima-Maricopa Indian Community v. United States, 9 Ct. Cl. 660, 677 (1986).

17. 463 U.S. 206 (1983).

18. 28 U.S.C. § 1491 (1948).

19. 445 U.S. 535 (1980).

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ment and held the General Allotment Act created only a limited trust relationship between the United States and the allottees, which did not of itself impose a fiduciary duty on the United States to manage timber resources on allotted lands. Rather, this limited trust was only for the purpose of preventing improvident alienation and assuring immunity from state taxation.[20] However, *Mitchell I* left open the question whether the plaintiff allottees could recover under some source other than the General Allotment Act.[21]

On remand, the United States Court of Claims took the Supreme Court's lead and held that the plaintiffs could assert a cause of action under the Tucker Act based on various federal statutes involving timber management, road building and rights-of-way, Indian funds management and government fees, and the regulations promulgated thereunder.[22] The court further held that these statutes and regulations gave the federal government full authority to manage the Indian property and land, and thereby created a fiduciary duty on the part of the United States in carrying out such management functions.[23]

The Supreme Court affirmed in *Mitchell II*, noting that the timber management statutes relied on by the lower court established comprehensive responsibilities on the part of the federal government in managing the harvesting of Indian timber, with the BIA exercising literally daily supervision over the harvesting and management process.[24] The Court held that where such a relationship exists, a fiduciary obligation necessarily arises since "[a]ll of the necessary elements of a common law trust are present: a trustee (the United States), a beneficiary (the Indian allottees) and a trust corpus (Indian timber lands and funds)."[25] The Court went on to state that

> Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing

20. *Id.* at 542-45. See *supra* text accompanying note 4.
21. 445 U.S. at 546.
22. 25 U.S.C. §§ 406, 407, 466 (1982).
23. Mitchell v. United States, 664 F.2d 265, 267-68 (Ct. Cl. 1981).
24. 463 U.S. 206, 222-25 (1983).
25. *Id.* at 225. *See* RESTATEMENT (SECOND) OF TRUSTS § 2, comment h, (1959).

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or underlying statute (or other fundamental document) about a . . . trust or fiduciary connection.[26]

Mitchell I and *Mitchell II* can be read as establishing two separate principles under which a full fiduciary relationship may be established between the United States and individual Indian owners of trust allotments. First, an express trust may be created by the terms of a treaty, statute, executive order, or other operative document.[27] Second, the existence of the fiduciary relationship may be implied from the federal government's supervision or control over Indian property.[28] One court has indicated that the establishment of a full trust by implication, from control over Indian property, is a principle peculiar to Indian tribes, and is "a narrow exception . . . to the requirement that the government must expressly state its intent to manage the would-be beneficiaries' property as a trustee."[29] The notion that a fiduciary relationship between the United States and Indian tribes can arise by implication is an outgrowth of the general trust responsibility that the United States owes to Indian tribes, which properly recognizes the long history of federal control over Indian property. At a minimum, the fiduciary duty that arises from control over Indian property encompasses the solemn duty to protect the property from improvident alienation.

Where such congressionally authorized control over Indian property is established, a fiduciary relationship exists with respect to that property, even though nothing is said expressly in the underlying or authorizing statute about a trust or fiduciary connection.[30]

26. 463 U.S. at 225 (approving Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980)).

27. *Mitchell II*, 463 U.S. at 222-25. *See also* Pawnee v. United States, 830 F.2d 187 (Fed. Cir. 1987) (Indian mineral-leasing statutes and regulations established fiduciary relationship); Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393 (8th Cir. 1987) (1916 Act giving Secretary authority to manage Indian forest in a way beneficial to Red Lake Band established fiduciary relationship); Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv., 792 F.2d 782 (9th Cir. 1986) (Indian Mineral Leasing Act of 1838 establishes fiduciary relationship); Navajo Nation v. Hodel, 645 F. Supp. 825 (D. Ariz. 1986) (Indian Child Welfare Act and Snyder Act creates fiduciary relationship); Ute Indian Tribe v. Hodel, 673 F. Supp. 619 (D.D.C. 1987) (congressionally established judgment fund established fiduciary relationship).

28. *Mitchell II*, 463 U.S. at 225. *See also* Gila River Pima-Maricopa Indian Community v. United States, 9 Ct. Cl. 660, 676-77 (1986); Navajo Tribe v. United States, 9 Ct. Cl. 336, 344 (1986).

29. Hohri v. United States, 782 F.2d 227, 244 n.39 (D.C. Cir. 1986).

30. Cape Fox Corp. v. United States, 4 Ct. Cl. 223 (1983); American Indians Residing

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This proposition is consistent with the notion that no particular words or phrases are critical to the finding of a trust relationship when it is otherwise clear that Congress intended a trust relationship to exist.[31] In other words, that Congress chooses to retain control and supervision over tribal property is an indication of its intention to maintain a trust relationship with respect to such property. This is particularly true where the property is the land base itself, as opposed to, for example, the timber resources appurtenant to the land, as was the case in *Mitchell*. Protection of the Indian land base is an area where the trust responsibility has its greatest force.[32] Any abdication of that responsibility should not be lightly inferred.

The two principles introduced above will be elaborated on and applied more fully in connection with the discussion in part II, concerning the establishment of fiduciary duties in approving mortgages of trust land. Before turning to that issue, however, it is necessary to examine the standards under which the federal trustees' actions are measured.

The Standard of Conduct

Once the complete trust relationship is established, a further inquiry must be made into the standard of conduct to which the United States trustee will be held in its dealings with the Indian people. In general, where the United States has charged itself with trust responsibilities, its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should be judged by the most exacting fiduciary standards.[33] This strict standard is applicable in judging the conduct of the federal government in transactions concerning Indian land.[34] In such cases, the United

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on Maricopa-Ak Chin Res. v. United States, 667 F.2d 980 (Ct. Cl. 1981); Navajo Tribe v. United States, 624 F.2d 981 (Ct. Cl. 1980).

31. Whiskers v. United States, 600 F.2d 1332, (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

32. Seminole Nation v. United States, 316 U.S. 286 (1942); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1953); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979).

33. Seminole Nation v. United States, 316 U.S. 286 (1942); Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981); Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

34. Coast Indian Community v. United States, 550 F.2d 639, 652 (Ct. Cl. 1977); Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); Aguilar v. United States, 474 F. Supp. 840 (D.C. Alaska 1979).

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States has an obligation to safeguard the property of the Indians in dealings with third parties, and an even greater duty exists where the United States itself has an independent interest in the transactions.[35]

Thus, where the trust relationship is established, the standard of conduct by which actions of the United States on behalf of Indian people will be judged is not mere reasonableness but is of the highest fiduciary standard.[36] Consequently, in judging the conduct of federal officials taken pursuant to their trust responsibility, courts should apply the same trust principles that govern the conduct of private fiduciaries.[37] In reviewing the actions of the federal trustee, one can look to the general law of trusts in determining whether the federal trustee has complied with its obligations.[38]

On the other hand, the Court of Claims seems to take a more restricted position. In *Navajo Tribe v. United States*,[39] the Court of Claims stated that the federal trust obligations are not necessarily coterminous with those of a private fiduciary.[40] This position clearly seems wrong. The only instance where private fiduciary rules should not apply are those in which the full trust has not been established, as was the case in *Mitchell I*. But where the full fiduciary relationship is established, either implicitly, through control or supervision over Indian property, or expressly, by treaty, statute, or otherwise, there is no reason not to look to the law of private fiduciaries to judge the conduct of the federal trustee. To the contrary, where the full fiduciary relationship is established, the federal trustee is always governed by the "most exacting fiduciary standards."[41]

Although *Navajo Tribe* appeared to reject the law of private fiduciaries in all contexts to judge the conduct of the federal trustee, the court in reality seemed not so much concerned with the applicable standard of conduct as with the scope of the federal trustee's duties. That is, the court's opinion is more consistent if one were to look at it in the context of analyzing the scope

35. Navajo Tribe v. United States, 364 F.2d 320, 322-23 (Ct. Cl. 1966).

36. American Indians Residing on Maricopa-Ak Chin Res. v. United States, 667 F.2d 980 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982).

37. Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv., 792 F.2d 782, 794 (9th Cir. 1986).

38. Navajo Tribe v. United States, 9 Ct. Cl. 336, 412 (1986) (citations omitted).

39. *Id.*

40. *Id.*

41. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

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of the federal trustee's duties. In stating that private fiduciary law is not always applicable in Indian trust cases, the court gave as an example the rule that the federal trustee does not have a general duty to maximize income from tribal resources.[42] In this context, the court was, in reality, concerned with the scope of the trustee's obligations, rather than the proper standard of conduct. There can certainly be a problem in establishing the proper parameters of a trust created by implication. Where the fiduciary relationship is inferred from control over Indian property alone, this does not, as the court in *Navajo Tribe* stated, confer the affirmative duty on the federal trustee to maximize income from tribal land. To find such a duty, one must necessarily look to applicable statutes, treaties, and other relevant sources.[43]

Thus, the duty to make trust property productive, that is, affirmative management duties, may not be inferred from control alone. This is not to say, however, that the duty to manage may never be inferred from supervision or control over Indian property. In essence, the extent of the federal trustee's duties depend upon the extent of control and supervision it exercises. The more comprehensive the control, the more comprehensive the duties to affirmatively manage the property.

Regardless of the affirmative duty to make trust property productive, the federal trustee always owes a fiduciary duty, whether it be express or implied from control over Indian property, to protect and preserve the trust corpus. The duty to protect trust property, especially the Indian land base, lies at the very heart of the Indian trust doctrine.[44]

In addition, the tendency to look beyond mere control over property to establish affirmative management duties does not apply where trust monies are concerned. With respect to trust funds, the rule appears clear that the United States must undertake affirmatively to maximize the trust income.[45]

42. 9 Ct. Cl. at 412 (citing Navajo Tribe v. United States, 222 Ct. Cl. 158 (1979)).

43. *See* Navajo Tribe of Indians v. United States, 9 Ct. Cl. 336, 412 (1986). *See also* White Mountain Apache Tribe v. United States, 11 Ct. Cl. 614, 619 (1987) (fiduciary duty to act affirmatively does not arise independent of linchpin treaty, statute, executive order, or regulation that charges government with specific duties to act).

44. See *supra* text accompanying note 32.

45. Ute Indian Tribe v. Hodel, 673 F. Supp. 619, 621 (D.D.C. 1987); Cheyenne Arapaho Tribe v. United States, 512 F.2d 1390, 1394 (Ct. Cl. 1975). *See* Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393, 1399 (8th Cir. 1987) (Secretary's duty to manage funds generated from forest reserve included the duty to actively seek the best use of the funds).

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The Standard of Care

Having analyzed the standard of conduct and the scope of the federal trustee's fiduciary duties, it is appropriate also to discuss the proper standard of care and its various implications. The Supreme Court discussed the proper standard of care in *United States v. Mason*.[46] The Court properly made reference to general principles of the law of private trusts, holding that as a trustee serving in a fiduciary capacity, the United States is duty bound to exercise "great care" in administering its trust.[47] The Court then noted that the trustee is not an insurer of trust property. Rather, it is under a duty in administering the trust to exercise "such care and skill as a man of ordinary prudence would exercise in dealing with his own property."[48] The prudent person standard is the generally accepted standard of care in the law of private fiduciaries.

The degree of care the federal trustee must exercise depends in part upon the situation of the trust property. Where the actions of the federal trustee involve potential alienation of the trust corpus, the degree of care exercised by the federal trustee will be given stricter scrutiny.[49] On the other hand, the federal trustee will be given more leniency when it comes to his duties to make trust property productive. In such cases, the trustee must use "reasonable care and skill to make the trust property productive."[50]

Holding the federal trustee to a stricter standard in cases involving possible alienation of trust property comports with the prudent person standard articulated in *Mason, supra*. It seems obvious that the man of ordinary prudence, when faced with the possible destruction or alienation of his property, would exercise a greater degree of care in making decisions than he would when faced with ordinary investment alternatives, as, for example, which alternative yields a higher rate of return. Thus, where the trust property itself is not in danger of destruction but the only question is how to manage it so that it will produce income (assuming the duty to manage exists), the prudent person may not use as

46. 412 U.S. 391 (1973).

47. *Id.* at 398 (citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)).

48. *Id.* (citing 2 A. SCOTT, TRUSTS 1408 (3d ed. 1967)).

49. *See, e.g.*, Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978) (holding that United States breached its fiduciary duties in allowing termination of Indian rancheria held in trust).

50. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

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great a degree of caution in making his decision. In fact, the prudent person may choose riskier alternatives that may turn out to be more profitable than a safer alternative in the long run.

The point is, the care that a man of ordinary prudence would exercise in dealing with his own property denotes a certain degree of caution, skill, and good judgment.[51] Prudence is equated with caution as to danger of risk, as skill and good judgment in the use of resources. Thus, a prudent person exercising reasonable care by definition will use that degree of caution, skill, and good judgment in the use of resources that is equated with the common definition of prudence.

In addition, while the normal standard of care and skill required of a trustee is that of a man of ordinary prudence in dealing with his own property, if the particular trustee has a greater degree of skill than that of a man of ordinary prudence, he will be held liable for any loss resulting from the failure to use such skill as he has.[52]

II. *The Federal Trust Responsibility in Approving Mortgages Under Section 483a*

Trust Responsibility of the Secretary of the Interior

Based on the above discussion concerning the establishment of a fiduciary duty on the part of the federal government in the management of trust allotments, the question arises as to whether the federal government, acting through the Bureau of Indian Affairs owes strict fiduciary duties in approving mortgages of trust allotments under section 483a. The answer appears clearly to be in the affirmative.

First, full fiduciary duties may be established expressly from the General Allotment Act and section 483a themselves. That is, under the General Allotment Act, the United States has an express trust obligation to prevent improvident alienation of the trust allotments. To the extent one comes within the parameters of this

51. It is generally recognized that caution is implicit in the element of prudence. The more modern tendency is to emphasize this by stating that the test is not how one would act with regard to one's own property, but how a prudent trustee would act in administering the property of *others* or how a trustee would act in *conserving* the property. *See* UNIFORM PROBATE CODE § 7-302 (1969). *See also* E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENT'S ESTATES AND TRUSTS 592 (3d ed. 1981).

52. Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973); RESTATEMENT (SECOND) OF TRUSTS § 174, comment at 379 (1959).

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so-called limited trust, full fiduciary responsibilities should be established. Moreover, the trust duty to prevent improvident alienation mandated in the General Allotment Act was carried over by Congress into section 483a. Given the wording in the text of section 483a, as well as its legislative history,[53] it is fairly clear that Congress did not intend that the mortgage approval process be taken lightly.

Section 483a makes the executed mortgage "subject to approval by the Secretary of the Interior."[54] It is noteworthy that Congress did not confer absolute discretion on the Secretary in making his decisions to approve or disapprove the mortgages. This suggests the seriousness with which Congress viewed the approval process. In those instances where Congress gives the Secretary discretion in the decision-making process, usually with respect to management functions, the Secretary's conduct will be judged by less stringent standards and will generally be upheld unless found to be arbitrary, capricious, or unreasonable.[55] When Congress wishes to confer discretion on the Secretary, it will generally do so expressly on the face of the statute.[56] It follows then, that Congress knows how to clothe the Secretary with discretion in discharging his duties to administer Indian affairs, and where it wishes to do so, will do so expressly. The fact that Congress did not commit the approval of trust mortgages to the discretion of the Secretary indicates that Congress recognized the possibility of improvident alienation of the allotments through subsequent default and foreclosure. Congress was therefore concerned with taking appropriate precautions against such alienation by requiring the Secretary or his delegates to use proper care in making his decisions in order to ensure the protection of the trust property.

The legislative history of section 483a supports this conclusion. Senate Report No. 1647 emphasizes that the approval of mortgages be "under proper supervision."[57] Moreover, the Committee on Interior and Insular Affairs, to which the bill was referred,

53. In determining whether legislation preserved a beneficial interest in the Indian people, courts will examine the face of the act itself, its legislative history, and surrounding circumstances. Idaho v. Andrus, 720 F.2d 1461 (9th Cir. 1983), *cert. denied*, 469 U.S. 824 (1984).

54. See *supra* note 6.

55. *See, e.g.*, Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383 (10th Cir. 1982).

56. *See, e.g.*, 25 U.S.C. §§ 337, 349, 350, 352a, 392, 396d, 396e, 403, 409a, 483 (1982).

57. 1956 U.S. CODE CONG. & ADMIN. NEWS 2304, 2305.

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was assured by representatives of the Bureau of Indian Affairs that "proper care" would be exercised in approving mortgages in order "to prevent improvident loans which would result in the alienation of Indian lands."[58]

It should therefore be apparent from the text and legislative history of section 483a that Congress fully intended that the trust responsibility recognized in the General Allotment Act be maintained and continued in full force under section 483a. That the mortgages are subject to the approval of the Secretary, under proper supervision and care as evidenced in the legislative history, makes this conclusion seem inescapable.

Moreover, while section 483a provides that for purposes of foreclosure the land shall be considered held in fee, there is no evidence that Congress intended to abrogate these trust responsibilities prior to the approval of the mortgages. Any withdrawal of trust obligations by Congress must be plain and unambiguous to be effective,[59] and no such intent exists in section 483a.

A federal district court has imposed strict fiduciary duties in a similar situation where transactions involving Indian land required the approval of the Secretary of the Interior or his delegated agent. *Coomes v. Adkinson*[60] was a case concerned with the duties of the federal government in approving leases of restricted Indian allotments under section 393 of title 25. Under section 393 the leases were subject to the approval of the Superintendent of the Bureau of Indian Affairs or other officers in charge of the reservation, under rules and regulations prescribed by the Secretary of the Interior. The plaintiffs in *Coomes* were challenging a decision by the BIA to reject the lease bids on six grazing units. The *Coomes* court correctly noted that section 393 was concerned with Indian lands, and that in dealing with such the federal government is in a position of trustee and must "maintain sharp focus on and strict adherence to concomitant fiduciary responsibilities."[61] The court then noted that the purpose of section 393 was the protection of Indian lands and the prevention of fraud and unfairness in leasing those lands.[62] Since the Secretary was granted supervisory power to see that this purpose was effectuated, the court

58. *Id.*

59. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

60. 414 F. Supp. 975 (D.S.D. 1976).

61. *Id.* at 986.

62. *Id.* at 991.

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held that section 393 created a fiduciary relationship that imposed strict and distinctive obligations of guardianship trust which would be judged by the most exacting fiduciary standards.[63]

The underlying rationale for imposing full trust responsibilities in *Coomes* was the fact that the lease transactions required to be approved by the Secretary involved Indian land. That the Secretary is required to approve transactions involving the Indian trust land is entirely consistent with the high fiduciary responsibilities it owes in managing trust land.[64] It is in this situation that there exists all the elements of a common law trust. The federal government (trustee) is making decisions pursuant to a legal obligation imposed by Congress, with respect to the Indian land (the trust corpus), in the best interests of the Indian people (the beneficiaries).[65] Consequently, in this situation the conduct of the federal trustee should be judged by those fiduciary standards applicable to common law trustees.

The *Coomes* case raises a second argument for imposing full trust responsibilities on the federal government in approving mortgages under section 483a. The very fact that the Secretary's decisions under section 483a reflect a certain degree of control and involve a danger of alienation of the trust land should itself be sufficient to establish fiduciary responsibilities. By requiring secretarial approval of the mortgages under section 483a, Congress has granted a certain degree of supervision and control to the federal government over the affected allotments.[66] The ap-

63. *Id.*

64. Navajo Tribe v. United States, 365 F.2d 320 (Ct. Cl. 1966); Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521, 534-35 (D. Utah 1981), *aff'd*, 671 F.2d 383 (10th Cir. 1982). *Cf.* Montana Bank of Circle v. United States, 7 Ct. Cl. 601 (1985) (federal statute requiring Secretary's approval of any contracts made between any person and any Indian tribe or individual Indian does not establish full fiduciary duties since the relationship created thereunder is not comparable in purpose or degree to the control or supervision of tribal monies or properties that has been found to establish a complete fiduciary relationship).

65. See *supra* text accompanying note 25.

66. Presumably, the Department of the Interior would have enacted rules and regulations under which the provisions of section 483a would be carried out, with a view toward taking proper care to prevent the approval of improvident loans consistent with the congressional mandate. Unfortunately, this writer has been unable to find any such regulations. The only published regulations, at 25 C.F.R. § 152.34, state simply that "[p]rior to approval of such mortgage or deed of trust, the Secretary shall secure appraisal information as he deems advisable." It appears that this language is directed only at ensuring that the value of the allotted land used as collateral is sufficient to secure the loan in case of default, in order to satisfy creditors. If this is the case, it falls far short of exercising proper care to prevent improvident loans.

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proval clause in section 483a reflects the tradition of federal control over Indian lands, at least up to the point where the mortgage is duly approved.[67] As such, the federal trustee has a strict fiduciary duty to ensure the protection of the land.

Mitchell II recognized that where the federal government assumes or has control or supervision over tribal property the fiduciary relationship normally exists with respect to such property (unless Congress had directed otherwise).[68] In those situations where the government is dealing with Indian property, the existence of a fiduciary relationship can be inferred even though nothing is said expressly in the underlying statute about a fiduciary relationship.[69] This proposition is attributable to settled doctrine that the United States, as regards its dealings with the property of the Indians, acts as a trustee.[70]

The rule that federal supervision and control over trust property is of itself sufficient to establish a fiduciary relationship has even more force where the decisions affecting the trust property involve a risk of alienation.[71] Approval of mortgages of trust allotments under section 483a clearly involves a real risk of alienation, one that Congress recognized in considering passage of section 483a.[72] Under these circumstances the decisions of the Bureau of Indian Affairs should be subject to the fiduciary standards of a private trustee, and in making the decision whether to approve the mortgage the federal trustee should use great care to ensure the protection of the trust land.

In sum, there are basically two arguments, either of which establishes a fiduciary duty upon the Secretary of the Interior in approving mortgages under section 483a. First, there is an express trust responsibility under the General Allotment Act and section 483a to prevent improvident alienation of the trust allotments.

67. Northwest South Dakota Prod. Credit Ass'n v. Smith, 784 F.2d 323, 326 (8th Cir. 1986).

68. 463 U.S. 206, 225 (1983).

69. Navajo Tribe v. United States, 624 F.2d 981, 987 (Ct. Cl. 1980). See *supra* notes 30, 32 and accompanying text.

70. Cramer v. United States, 261 U.S. 219 (1923); American Indians Residing on Maricopa-Ak Chin Res. v. United States, 667 F.2d 980 (Ct. Cl. 1981); Navajo Tribe v. United States, 364 F.2d 320, 322 (Ct. Cl. 1966); Oneida Tribe v. United States, 165 Ct. Cl. 487 (1964); Menominee Tribe v. United States, 101 Ct. Cl. 10, 19 (1944); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973).

71. See *supra* text accompanying note 32.

72. See *supra* text accompanying notes 57, 58.

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Second, notwithstanding the express trust obligations created by Congress in the two statutes, that the federal trustee is required to make decisions that touch and concern the trust land is itself sufficient to establish a fiduciary relationship because this amounts to sufficient control and supervision over trust property to infer the fiduciary relationship. While the degree of control evidenced in section 483a may not by itself be comprehensive enough to establish affirmative management duties, it most certainly imposes upon the federal trustee the duty to protect and preserve the trust land. These related propositions should make it indisputable that the Secretary of Interior owes strict fiduciary duties in approving mortgages of Indian trust allotments under section 483a.

Trust Responsibilities of the Farmers Home Administration

Thus far, the discussion has centered around the trust responsibilities of the Secretary of the Interior under section 483a. However, findings of the Aberdeen Area Credit Task Force and the National Indian Agricultural Working Group[73] have raised an additional issue with respect to another agency of the federal government, the Farmers Home Administration (FmHA). According to the Task Force report, as of August 1985, there were in the Aberdeen area a total of 875 Indian mortgages, encumbering 421,819 trust acres, with a debt burden of more than $40 million. The FmHA was the lending agency in 610 (70%) of these mortgages, involving approximately 248,390 acres, or 58.8% of the mortgaged trust lands in the area.[74] As of August 1985, the overall rate of loan delinquency stood at approximately 80%.[75]

By October 1986, 477,703 acres had been mortgaged in the Aberdeen area, and the debt burden increased to $45.9 million.[76] The FmHA was by far the biggest lender, holding $27.9 million in mortgages.[77]

The situation is much the same in the Billings area.[78] As of October 1986, there were 377,449 acres of individual trust land under mortgage, with a debt burden of $52.1 million. Again, the

73. See *supra* note 8.

74. Task Force Report, *supra* note 8.

75. Aberdeen Area Credit Task Force Minutes of Meeting (Aug. 23, 1985).

76. Fredericks, AIACC Report, *supra* note 8.

77. *Id.*

78. The Billings area encompasses all of Indian country in Montana, except the Flathead Indian Reservation in western Montana, and Wyoming.

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FmHA was the largest lender, holding $16.7 million in mortgages.[79] Moreover, as of March 1987, an estimated 145,450 acres of trust land in Montana and the Dakotas had already been lost or was in the immediate danger of foreclosure by the FmHA.[80]

Thus, to the extent that the FmHA is dealing directly with Indian allottees in the loan transactions involving mortgages of trust lands, the issue arises whether under these circumstances the FmHA itself, as an agency of the United States, owes trust responsibilities to the Indian allottees with whom it deals.

Since it is the United States that stands in the trust relationship,[81] it has been held that *any* federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes.[82] Thus, where the United States itself owes fiduciary obligations, any agent of the United States would be obligated to carry out the same duties in their dealings with the Indian people.

There is no question that in dealing with Indian people the FmHA, as an agency of the federal trustee, must keep in mind and adhere to that special relationship of guardianship-trust (i.e., the general trust responsibility) existing between the United States and Indian people.[83] But since recent court decisions have distinguished between the existence of the general trust and the establishment of a complete trust relationship with full fiduciary duties,[84] it is necessary to further determine whether the FmHA may be held to the fiduciary standards indicative of a complete trust. This question depends upon whether the United States itself owes complete fiduciary duties in ensuring the protection of the trust land base.

Section 483a specifically delegates approval of the trust land mortgages to the Secretary of the Interior and therefore cannot be used as a basis for imposing fiduciary duties on the FmHA,

79. Fredericks, AIACC Report, *supra* note 8.

80. NIAWG Final Report, *supra* note 8.

81. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

82. Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981) (EPA owed fiduciary duties to the Crow Tribe in determining whether approval of a redesignation of air quality standards on adjacent Northern Cheyenne Reservation from class II to class I adversely affected Crow Tribe's ability to mine coal). *See* Ute Indian Tribe v. State, 521 F. Supp. 1072, 1141 n.187A (D. Utah 1981) (actions of the United States Forest Service in its dealings with Indians are subject to being judged by the most exacting fiduciary standards of the federal trust responsibility.). *See also* Eric v. Secretary of Dep't of Housing, 464 F. Supp. 44 (D. Alaska 1978).

83. See *supra* notes 10, 16, 17, and accompanying text.

84. See *supra* note 11 and accompanying text.

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an agency of the Department of Agriculture. However, the fact that Congress has delegated the trust responsibilities of the United States to the Secretary of the Interior under section 483a cannot of itself constitute an abrogation of the federal trust responsibility as it exists under other sources of law in the absence of express congressional intent to the contrary.[85] The federal trust responsibility is primarily administered through the Department of the Interior and the BIA,[86] but this should not exempt other agencies of the United States from the federal trust responsibility as it otherwise exists, to the extent that those agencies are dealing directly with Indian people and resources.[87] Thus, if a strict fiduciary relationship between the United States and the allottees can be established under some source other than section 483a, the FmHA should be subject to that relationship.

Under the General Allotment Act, it is the United States that holds the land in trust for the sole use and benefit of the allottees.[88] It follows that any agency of the United States coming within the parameters of the General Allotment Act's limited trust as set forth in *Mitchell I* should be subject to strict fiduciary duties in administering the obligations under the trust.

One of the duties established under this limited trust is the prevention of improvident alienation.[89] It seems clear that the FmHA operates under this responsibility in reviewing and approving Indian loan applications under which trust allotments are mortgaged. The FmHA deals directly with the Indian loan applicant, and the transaction concerns the possible alienation of trust land. Under these circumstances, given the existence of the General Allotment Act's limited trust, as well as the traditional application of fiduciary responsibilities where the federal trustee is charged with protecting trust land,[90] it appears clear that the FmHA is subject to strict fiduciary duties in approving loan transactions which involve mortgaged trust land.

85. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

86. Nevada v. United States, 463 U.S. 110 (1983). *See* Ute Indian Tribe v. State, 521 F. Supp. 1072 (D. Utah 1979).

87. *See* Ute Indian Tribe v. State, 521 F. Supp. 1072, 1141 n.187A (D. Utah 1979).

88. 25 U.S.C. § 348 (1982).

89. See *supra* note 4.

90. *See, e.g.*, Begay v. Albers, 721 F.2d 1274 (10th Cir. 1983); Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966); Kenai Oil & Gas, Inc. v. Department of Interior, 522 F. Supp. 521 (D. Utah 1981), *aff'd*, 671 F.2d 383 (10th Cir. 1982); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978); Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D. 1976).

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Thus, the FmHA and the BIA, as agents of the federal trustee, should owe strict fiduciary duties in reviewing and approving mortgages of trust land, to the extent both are directly involved in the transactions.[91] Consequently, the FmHA would not be in the position of a mere creditor in mortgaging Indian lands. Rather, the FmHA stands in the fiduciary capacity of the federal government, and as such must exercise proper care to protect the trust land in approving the mortgages.[92]

Fulfilling the Trust Responsibility

Given that the BIA and the FmHA both owe strict fiduciary duties in reviewing and approving mortgages of trust land, their regulations should reflect these duties in the loan application and approval process. In order to adequately gauge these responsibilities, it is appropriate to examine what must be done in order to fulfill those duties, keeping in mind that the federal trustee serving in a fiduciary capacity must, under the prudent person standard, exercise great care to protect with the trust land.[93]

It is clear that in determining whether to approve or disapprove a proposed mortgage, the federal trustee must take all relevant factors into account. This is so even where the decision is discretionary.[94] Given the risk involved, these factors should be considered with a view toward protecting the trust lands. It follows

91. The FmHA and BIA's situation are analogous to that of co-trustees since each agency deals directly with the Indian beneficiary on behalf of the United States. As co-trustees each agency is individually responsible for fulfilling its own fiduciary duties, and the one may not rely on the other to administer the trust. Where there are several trustees, each of them is under a duty to participate in the administration of the trust and to use reasonable care to prevent the co-trustee from committing a breach of trust. *In re* Mueller's Trust, 135 N.W.2d 854, 865-66 (Wis. 1965).

92. That the FmHA is acting both as lender and federal trustee in this situation raises an additional issue of conflict of interest. As a lender, the federal trustee's interests are potentially adverse to those of the debtor, the Indian beneficiary. Because of this, and because of the government's special duty toward the Indians, the various mortgage transactions must be carefully scrutinized. Navajo Tribe v. United States, 364 F.2d 320, 323 (Ct. Cl. 1966). *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

93. *See* 2 A. SCOTT, TRUSTS 1408 (3d ed. 1967). Recall that in part I of this article, it was argued that a fiduciary is under a greater duty of care when the transaction involves a risk of alienation of the trust property. In such a case, the prudent person will by definition exercise greater care because caution as to risk of loss is implicit in the word "prudence."

94. *See* Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 383 (10th Cir. 1982) (where the federal trustee was clothed with discretion in the decision-making process, standard of review was whether decision was arbitrary, capricious, and an abuse of discretion and if trustee *considered all relevant factors* in reaching his decision and made no clear error of judgment, decision could not be overturned).

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that the decision maker, whether it be the FmHA or the BIA, should scrutinize each loan application and use a proper degree of care and caution to prevent the approval of improvident loans that would result in the subsequent alienation of the trust land.

Loan Repayability. The most important factor that should be taken into account is repayability. In order to adequately protect the mortgaged land, there must be a good prospect for repayment of the loan. Several factors are pertinent in this regard. First, the creditworthiness of the applicant should be determined by examining prior credit history and credit ratings. The higher the credit rating, the lower the risk of default and subsequent foreclosure.

Second, there should be a valid farm plan of operation accompanying each loan package. The most important factor to be examined in the plan of operation is profitability. Obviously, if the enterprise stands little chance of being profitable, there is less chance of repayment. Profitability is the essence of the operation, and it would be foolhardy to enter into any commercial enterprise without an adequate assessment of the prospects for profitability. Certainly, the prudent person would not do so.

In order to adequately assess repayability, it is essential to have a sound knowledge of the agricultural industry. This includes familiarity with the modern-day version of the industry and knowing it well enough to project what is likely to happen in the future.[95] Keeping informed of the impact of current trends in agriculture and planning accordingly is a necessary prerequisite in assuring the viability of the agricultural enterprise.[96]

Thus, for example, BIA employees providing management and technical assistance to Indian farmers should be aware of the market cycles associated with agriculture by accessing market forecasts and information that would enable them to make more accurate predictions concerning agricultural planning.[97] This

95. SWACKHAMER & DOLL, FINANCING MODERN AGRICULTURE: BANKING PROBLEMS AND CHALLENGES (1969) (available in the research department of the Federal Reserve Bank, Kansas City).

96. *Id.*

97. According to the Bureau of Indian Affairs Manual, the BIA Division of Credit and Financing has staff responsibility for all credit and financing matters, including loans to individual Indians, regardless of the lender. 47 B.I.A.M. § 3.1. The Division of Natural Resources, Office of Land Operations, is responsible for all technical agricultural matters. 47 B.I.A.M. § 3.4. Credit officers are responsible for the financial phases, while the employees of Land Operations are responsible for the planning phases of agricultural loans. 47 B.I.A.M. § 3.4(A)(3).

Presumably, these responsible parties are sufficiently qualified to provide adequate

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knowledge of the industry is an essential requisite in providing and adequately assessing farm plans. A prudent person certainly would not be without such knowledge in making decisions concerning his own property, and therefore such knowledge should be imputed to the federal trustee in reviewing agricultural plans of operation.

A third factor in determining the prospect of repayability is a consideration of economic factors affecting risk. For example, operational expenses in a livestock operation may include winter feeding, fencing, fuel, maintenance, leases, labor, and living expenses. An adequate projection of these and other operational expenses for each plan of operation is very important in figuring profitability and repayability. Obviously, any underestimation of operation expenses would create an illusion of increased profit margins. The practical result is that ten years into the operation the actual expenses may have cut so far into income as to reduce or eliminate profitability and thereby increase the risk of default on the loan. In order to prevent this, the federal trustee reviewing the loan package should ensure that a realistic projection of operational expenses has been provided. This would further ensure the integrity and viability of the operation, thereby further providing for the safety of the mortgaged trust land.

Related to the accurate projection of operational expenses in assessing economic factors related to risk is the price of particular agricultural goods produced and sold. In order to realistically predict prices at which goods will be sold, and to determine which type of goods will be more productive, the federal trustee must necessarily be aware of factors such as market trends, current prices, and existing volume, i.e., supply of particular types of agricultural goods.

For example, assume a loan application under which trust lands will be mortgaged is submitted in April and the proposed plan of operation will use loan proceeds to immediately purchase 300 head of yearling cattle. The plan further provides that the year-

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technical assistance in the area of agribusiness. It would seem that in order to fulfill their fiduciary duties in approving mortgages of trust land, the majority of which are taken for agricultural loans, these officers and employees would have to be sufficiently knowledgeable to be able to meet the prudent person standard of care in managing the trust property. Ideally, this means that the person in charge of planning should either be well experienced in agriculture or have a college degree in agribusiness. At least, the law will imply sufficient knowledge and ability on the part of the fiduciary to enable him to make the decisions of a prudent person, regardless of any real limitations. *See In re* Mild's Estate, 136 A.2d 875 (N.J. 1957). The standard of care is strictly objective.

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lings will be fattened on grass over the summer and sold in the fall. The proceeds, after payment of expenses including a payment on the loan will go to the purchase of more yearlings the next spring, again to be fattened for sale, and so on from year to year. However, the current price of yearlings is abnormally high due to increased market (buying) activity over the past three months in yearling cattle. Additionally, market experts have predicted that by fall the price of yearlings will be down substantially due to a glut on the market and that it will take at least five years for the yearling cattle market to recover to its current condition.

The federal trustee reviewing such a plan should plug these market factors into the plan of operation in ascertaining prospects of profitability and repayability. Undoubtedly the operator is in trouble at the outset and will take a loss under these circumstances. The result will likely be nonpayment on the loan and default, thus placing the mortgaged trust land in danger of alienation through foreclosure. Given the risk involved in such a venture, the prudent federal trustee should turn the loan down in favor of protecting the trust land, or at least amend the plan of operation to include production of a more profitable good.

A fourth factor that should be considered in determining repayability is the repayment schedule for the loan. Typically, agricultural loan payments are made on a yearly basis due to the nature of production periods. Loan payments amortized over longer periods of time result in smaller yearly payments that are easier to meet than those under short amortization periods, which create higher yearly payments. Thus, an amortization period of thirty years would be much more favorable than one over ten years. The effect of longer repayment periods makes it easier for the debtor to meet yearly payment obligations and has the additional benefit of neutralizing the exogenous factors of agriculture (i.e., factors that cannot be controlled, such as cost of goods sold, price, climatic conditions, etc.)[98] By spreading out the debt burden, the Indian farmer is better able to absorb the shock of a bad year or even two or three bad years. Thus, the risk of default is decreased in those loans amortized over longer periods of time. It follows that the shorter the amortization schedule, the greater the risks. The federal trustee in reviewing loan applications under

98. *See* S. REDFIELD, VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES, at xvii (1984).

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which trust land will be mortgaged will do well to look for longer amortization periods where possible.[99]

Questionable Past Practices. The factors discussed above are just a few of the relevant considerations in determining whether approving a mortgage of trust land is feasible. It is not yet clear to what extent an involved federal trustee actually considers these and other relevant factors in making that decision. However, at least two serious questions have been raised that if taken as true would place the fulfillment of the federal trust responsibility in grave doubt.

In the late 1970s, a large number of loans were made by the FmHA to Indian farmers under which trust lands were mortgaged and proceeds used to pay off prior bank (chattel) loans. The Fort Berthold Land and Livestock Association[100] has alleged that these loans were made under time constraints with very little planning and management and were amortized over short periods of time resulting in immediate delinquency.[101] Emergency short-term loans, hastily reviewed and approved and used to bail out prior obligations, are definitely not the sort of transaction in which trust lands should be mortgaged. There is obviously greater risk involved as a result of the short amortization period (resulting in high annual payments), as well as the fact that no additional value other than forgiving a prior debt is received. Moreover, there is an inherent risk because these were emergency disaster-type loans. Obviously such loans were not taken under the best of circumstances. It would seem that allowing trust lands to be taken as security in such a case would be a flagrant disregard of the federal trustee's obligation to protect and preserve the trust land.

In addition, several persons have reported that it has been the practice of the FmHA to approve agricultural loans based only upon the value of collateral, without consideration of earning capacity or repayability.[102] It was the FmHA's position that loans

99. The Indian Finance Act of 1974, 25 U.S.C. §§ 1451-1543, provides that loans may be for terms up to thirty years. 25 U.S.C. § 1464. Since land is not depreciable, real estate mortgages typically run for thirty years. It would seem that any time trust land is mortgaged, the federal trustee would require this thirty-year amortization schedule in order to place the risk of default at a minimum.

100. The Fort Berthold Indian Reservation is located in western North Dakota. As with all the Indian reservations in the Aberdeen area, agriculture is a major economic enterprise.

101. Fort Berthold Land & Livestock Ass'n, Resolution No. 14-84 (Feb. 14, 1984).

102. This information is based on reports from a meeting at Bismark, North Dakota, between Indian cattlemen and officials of the BIA and FmHA, held on Mar. 11, 1986.

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based upon earning capacity were too hard to obtain and that loans based upon adequacy of security were much more liberal and allowed for larger loans. Notwithstanding the lack of foresight in such an analysis, if the FmHA approved any loans involving mortgaged trust lands on this basis, and the BIA did likewise, such conduct would not even withstand analysis under the arbitrary, capricious, or unreasonable standard of review.[103]

Furthermore, it appears to have been the practice of the BIA to approve trust land mortgages for FmHA loans with little or no analysis of loan applications. At least in the Aberdeen area, the BIA does not review or conduct analysis on FmHA loans.[104] The failure of the BIA to conduct any independent review of trust land mortgages most certainly constitutes a breach of fiduciary duty.[105] The BIA has been charged with a most important fiduciary duty—to protect the Indian land base. In order to ensure adequate protection, it is imperative that the reviewing officials have a meaningful record before them at the time the decision to approve a trust land mortgage is rendered. All factors affecting repayability must be adequately scrutinized to protect the trust lands from improvident alienation. Anything less is unacceptable.

Finally, that nearly 80 percent of the trust land mortgages are currently in a state of delinquency in the Aberdeen area itself indicates a lack of care in approving the mortgages. It is hard to believe that proper care and caution were used to prevent improvident alienation of these trust lands when so many are currently in danger of foreclosure.

III. *Remedies Available to Indian Farmers Facing Foreclosure*

It should be clear by now that Indian farmers in danger of losing their land through foreclosure are not without hope. Serious issus have been raised concerning the role of the federal trustee in allowing trust land to be put in such danger of alienation. At this time, these issues remain unanswered. Yet, it is essential that the Indian farmer be aware that he is not without rights and that he does not stand alone in facing this potential disaster.

103. See *supra* note 82.

104. Letter from Acting Area Director Melvin Rousseau to Senator Kent Conrad (Aug. 31, 1987) (responding to concerns regarding potential loss of trust lands through mortgage foreclosure).

105. *See* Assiniboine & Sioux Tribes v. Board of Oil & Gas Conserv., 792 F.2d 782 (9th Cir. 1986).

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Judicial Alternatives

Given the magnitude of the problem, the prospect of a class action on behalf of Indian farmers who have trust lands under mortgage in the Aberdeen area seems appealing. The theory of liability would be breach of fiduciary duty by the United States, acting through the BIA and the FmHA. There are several alternatives that may be used to get judicial relief in such cases.

One alternative is a *Mitchell II*-type of action asserted in the United States Court of Claims. In *Mitchell II*, a claim for monetary damages for breach of trust was asserted under the Tucker Act.[106] By giving the Court of Claims jurisdiction over specific types of claims against the United States, the Tucker Act constitutes a waiver of the United States' sovereign immunity with respect to those claims.[107] However, the Court held in *Mitchell II* that the Tucker Act does not create any substantive right enforceable against the United States for monetary damages. A substantive right must be found in some other source of law, such as "the Constitution, or any Act of Congress, or any regulation of an executive department."[108] In order for a claim to be cognizable under the Tucker Act, the claimant must demonstrate that the source of substantive law he relies on can fairly be interpreted as mandating compensation by the federal government for the damage sustained.[109] This test will be satisfied where the claimant can show that the source of law he is relying on establishes a fiduciary relationship and defines the contours of the United States' fiduciary responsibilities. This is so because once the trust relationship is established,

106. The Tucker Act is codified at 28 U.S.C. § 1491 and states in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (1982).

A counterpart to the Tucker Act is the Indian Tucker Act, 28 U.S.C. § 1505, which gives any "tribe, band, or other identifiable group of American Indians" the same access to the Court of Claims provided to individual claimants under the Tucker Act. Claimants asserting a *Mitchell II*-type action should rely on both these statutes because as a class they may be considered an identifiable group under the Indian Tucker Act. *See* Fields v. United States, 423 F.2d 380 (Ct. Cl. 1970).

107. Mitchell v. United States, 463 U.S. 206, 212 (1983) (*Mitchell II*).

108. *Id.* at 216.

109. *Id.* at 216-17.

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it naturally follows that the government should be liable in damages for breach of its fiduciary duties.[110]

The substantive law that could be relied on by the injured Indian farmers in this case would be the General Allotment Act, section 483a, and all applicable rules and regulations thereunder, as well as other statutes and regulations affecting credit and finance in Indian agriculture.[111] As argued in part II of this article, the General Allotment Act and section 483a established fiduciary duties upon the government to prevent improvident alienation of allotted trust land. To the extent the claimants come within the parameter of this so-called limited trust, there should be a fiduciary relationship established, and therefore the claimants should be able to assert a claim under the theory of *Mitchell II*.

There is, however, one problem with such an action in that the claimants would be suing for monetary damages. As the situation now stands, most of the trust land under mortgage in the Aberdeen area has not yet been alienated through foreclosure. Until it is, the affected Indian farmers arguably would not be measurably damaged. In order to adequately assess damages, it appears that the claimants would have to wait until their land was taken before asserting a *Mitchell II*-type claim. It is unlikely that such a result would be very satisfying since the Indian farmers are probably looking to retain their land and their way of life rather than be compensated for its loss.[112]

A better alternative for those who still retain their land is to seek equitable relief whereby the improperly mortgaged trust land would not be subject to foreclosure actions. The best course of action in this regard would be to seek both declaratory and injunctive relief.[113] The plaintiffs would seek a declaration that (1) the United States owes fiduciary duties in approving mortgages of trust land, and (2) the federal trustee breached those duties in approving improvident mortgages, thus placing the trust land in danger of alienation. The plaintiffs would then seek an injunction against foreclosure on all the affected trust lands.

110. *Id.* at 224-26.

111. *See, e.g.*, 25 U.S.C. §§ 1451-1453 (1982); 25 C.F.R. §§ 101.1-101.25; 47 B.I.A.M. § 3.0.

112. On the other hand, it is arguable that damages could be measured by determining the amount necessary to satisfy the mortgage. This would obviously make the Indian debtor whole and put him back in the position he would have occupied but for the approval of the improvident loan.

113. *See, e.g.*, Smith v. United States, 515 F. Supp. 56 (N.D. Cal. 1978); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972).

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Jurisdiction in federal district court would be predicated on section 1331 as a federal question,[114] on the Declaratory Judgment Act,[115] and on the Administrative Procedure Act.[116] The scope of the United States' fiduciary duty in administering the trust property is considered a question of federal law and thus jurisdiction would lie under section 1331.[117] Further, under the Declaratory Judgment Act and the Administrative Procedure Act, the district court would have the authority to determine the legal relationships and review the actions of the BIA and FmHA in approving mortgages of trust land,[118] and to set them aside if found to be unlawful.

An equitable remedy of this or a similar type seems more attractive than a damages remedy under the Tucker Act. There is clearly more benefit in a remedy that would allow the Indian farmers to keep their most precious resource, their land base. The effect of the injunction would be to remove the cloud over the title to the land and allow the agribusinessmen to focus their efforts on starting anew, free from the constant threat that they may be put out of business at any time.

Nonjudicial Alternatives

Obviously, if the federal government and the Indian farmers could come to a mutual agreement aimed at rescuing the endangered trust lands, there would be no need to seek legal redress. The question is whether the federal government is willing to recognize the magnitude of the problem and take appropriate action in order to properly fulfill its trust responsibility, which has already been placed in doubt.

The federal government has become aware of the problem. A fact-finding forum on Indian agriculture was conducted at the Fort Berthold Reservation by the Senate Agriculture Committee,

114. 28 U.S.C. § 1331 (1982).

115. *Id.* § 2201.

116. 5 U.S.C. §§ 701-706 (1982).

117. United States v. Mason, 412 U.S. 391 (1973). *See* National Farmers Union Ins. Co's. v. Crow Tribe, 471 U.S. 845 (1985).

In addition, the federal statutes under which the fiduciary duty is established would also provide federal question jurisdiction.

118. 28 U.S.C. § 2201 (Supp. 1985); 5 U.S.C. § 706 (1982). *See* Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983) (district court had jurisdiction to review action taken by the BIA in refusing to recognize either a tribal council whose members were elected in 1980 or a council elected in 1982).

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chaired by Senator Kent Conrad of North Dakota.[119] At that forum, Senator Conrad expressed concern over the apparent lack of meaningful reviews of trust land mortgages by the BIA.[120]

The Aberdeen Area Credit Task Force and the National Indian Agricultural Working Group have also studied the problem and have come up with a number of proposed solutions. As an immediate solution, the Task Force recommends that the BIA, working in conjunction with the FmHA and other lenders, develop and implement a program that provides for restructuring of problem loans with a set-aside of funding for cash flow operations.[121] This plan would require a transfer of funds from the FmHA to the BIA under which the BIA would, pursuant to the Indian Financing Act,[122] pay out existing loans based on fair market value of collateral and loan additional dollars to generate more cash flow for continued farm operations.[123] The Task Force also recommended that the BIA work with lenders in refinancing current debt through re-amortization of loan agreements, including discounting loans without penalty or interest.[124] The intention of this proposal is to revitalize agricultural operations and try to salvage and make productive that which otherwise would be lost. Such a plan seems reasonable, but whether the BIA will go along with it remains to be seen. However, with respect to trust land mortgages, it would seem that the BIA would be more than willing to accommodate this plan, if for no other reason than to avoid the expense and possible liability of the lawsuit that will almost certainly be brought in an attempt to save the trust lands.

In addition, the Task Force recommended development of a program to educate Indian agribusinessmen on the effective use of credit, including the development of an intense training program for Agency credit personnel in agricultural and related business that would give the credit personnel the expertise they need in financing Indian agriculture.[125] Here the Task Force is merely asking the BIA to do what it is responsible for in the first

119. Senate Comm. on Agriculture, 100th Cong., 1st Sess., Fact Finding Forum on Indian Agriculture (Sept. 1, 1987) (Before Honorable Kent Conrad, United States Senator, at New Town, North Dakota).

120. *Id.*, transcripts at 71-76.

121. Task Force Report, *supra* note 8, at 3.

122. 25 U.S.C. §§ 1451-1453 (1982).

123. Task Force Report, *supra* note 8, at 3.

124. *Id.*

125. *Id.*

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instance, that is, to be sufficiently knowledgeable in the business of agriculture to be able to make the sound decisions of a prudent person and thereby carry out its trust responsibilities. Knowledge of the industry is not merely a goal; it is an essential requirement in fulfilling the trust responsibility with respect to the financing of Indian agriculture. Given the fact that agriculture plays such an important role in so much of Indian country, it seems incomprehensible that the BIA as federal trustee would employ personnel with so little knowledge and experience in agribusiness at these crucial positions. If it does turn out that these key personnel were without sufficient knowledge and feel for agriculture, it will be the federal trustee and not the Indian beneficiary who suffers. The federal trustee is, as a fiduciary, held to a prudent person standard, and such knowledge of agribusiness will be imputed, regardless of any actual deficiencies.[126]

The National Indian Agricultural Working Group has made similar recommendations.[127] The Working Group has further recommended that the BIA and the FmHA work together to find solutions to prevent the potential erosion of the Indian land base.[128] More important, the Working Group recommends that the FmHA's trust responsibility be clarified and that its policies and procedures be reviewed to ensure adequate protection of trust resources in those cases where FmHA acts as the lender for Indian agriculture and loans.[129] The same should be done within the regulatory scheme of the BIA.

In the final analysis, the federal trustee still has a chance to cure what may well be a serious breach of trust. It is undisputed that many Indian trust lands "are in danger of foreclosure, presenting a serious threat to reservation economies and their trust land base."[130] Serious allegations have been made with respect to the circumstances under which these trust mortgages were executed. Undoubtedly, Indian agribusinessmen will not remain passive and watch their lands disappear. If nothing else, this article has raised the issues upon which the battle lines will be drawn. It is hoped that the precious land base of the Indian people will be preserved, and the tragic history of the many federal Indian land takings will not be repeated.

126. See *supra* text accompanying note 85.
127. NIAWG Final Report, *supra* note 8, at 43-44.
128. *Id.*
129. *Id.* at 48-49.
130. *Id.* at 48.

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Conclusion

The United States has charged itself with solemn trust responsibilities in protecting and preserving the Indian land retained in trust. Although the General Allotment Act attempted to extinguish traditional tribal property concepts, the federal trust responsibility to individual Indian owners to protect the land from improvident alienation remains. The mortgaging of trust lands undoubtedly involves a risk of alienation, and the federal trustee reviewing and approving such mortgages must closely evaluate each plan of operation with a view toward protection of the trust property. In order to adequately carry out his fudiciary duties in this regard, the federal trustee as a prudent person must have a sound knowledge of the agricultural industry and must exercise proper caution in evaluating the risks involved.

The extent to which the federal trustee has fulfilled his fiduciary obligations in approving mortgages of trust land is an issue yet unresolved. However, given the circumstances under which some of these mortgages were executed, and their status today, grave doubts have arisen. Indian agribusinessmen do not stand alone in their struggle to preserve their way of life. The federal trustee must be held accountable and should now make every effort to salvage those mortgaged trust lands which face the real and immediate danger of being lost forever. To the extent that the federal trustee has failed to fulfill his fiduciary obligation to protect and preserve the trust land, the Indian beneficiary should not be made to suffer the consequences. The goal is preservation, and every effort should be made and every remedy sought to achieve it. After all, the land is sacred.

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